United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7179

ORIGINAL

To be argued by
JAMES M. LEONARD
20 Minutes

United States Court of Appeals

FOR THE SECOND CIRCUIT

CHARLES SCALAFANI,

Plaintiff-Appellee,

against

MOORE McCORMACK LINES, INC., "MORMACDRAGO" D/A 1/2/71,

Defendant-Appellant and Third Party Plaintiff-Appellee,

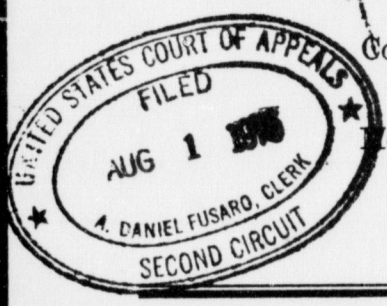
against

UNIVERSAL TERMINAL AND STEVEDORING CORP.,

Third Party Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of New York

BRIEF ON BEHALF OF THIRD-PARTY DEFENDANT-APPELLANT



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Cases Cited

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BRIEF ON BEHALF OF THIRD-PARTY DEFENDANT-APPELLANT

Issues Presented for Review

(1) Did the District Court err in failing to find, as a matter of law and upon the uncontradicted testimony, that Shipowner was not entitled to indemnification.

(2) Did the District Court err in applying an erroneout standard to the question of indemnity.

Statement of the Case

The Plaintiff, Charles Scalafani (hereinafter called "Plaintiff") brought suit against the defendant, Moore McCormack Lines Inc. (hereinafter called "Shipowner") for injuries allegedly sustained by Plaintiff while he was working in the capacity of longshoreman aboard a vessel owned by Shipowner, the Mormacdrago, on January 2, 1971. Shipowner, in turn, impleaded Universal Terminal and Stevedoring Corp. (hereinafter called "Stevedore"), seeking indemnification as to any damages recovered by Plaintiff against Shipowner (along with counsel fees and expenses).

The summons and complaint were filed on May 5, 1972 and the third-party complaint was filed on July 6, 1972. Trial was commenced before Constantino J., non jury, on May 6, 1974. The case was tried intermittently thereafter and was concluded on September 24, 1974.

On February 10, 1975, Judge Constantino rendered his memorandum decision (No. 199a).* In Judge Constantino's decision it was determined that the Shipowner was liable to Plaintiff and that Shipowner was entitled to recover indemnity over as against Stevedore.

No determination as to damages has been yet made. The case has been certified for appeal to this court.

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*Numerical references followed by the letter "a" are to pages in the Joint Appendix.

Facts

Much of the factual pattern underlying this case is adequately reflected in the memorandum decision of the Trial Court (200a). Nonetheless, for purposes of emphasizing the actual testimony as it is pertinent to the issues presented herein, we take the liberty of reciting certain of the facts.

The SS MORMACDRAGO was moored to the 23rd Street Pier in Brooklyn on January 1, 1971. Shipowner produced one Gerald Gordon, whose testimony was taken by deposition (87a). Gordon was the relief mate in charge of the ship from 0800-1600 on January 1, 1971 (93a). On that day, no cargo activity took place (94a). The ship, however, experienced heavy snow during Gordon's watch (93a), the snow stopping sometime during the next watch (96a, 100a).

Gordon further testified, from the log entries which he had made, that a shore gang had come aboard at 1300 on January 1 to clean the deck and gangway with regard to the accumulated snow (94a). Though the identity of the company which performed this now removal is somewhat unclear (the Court finding it to be a gang employed by Atlantic Coast Industries Corp. (201a)), it is plain that, whoever did the job, it was not Stevedore (54a).

Gordon testified that he came on watch again at 0800 on January 2, 1971 (101a). He inspected the gangway (among other areas) and determined that, in his judgment, it was not unsafe (101a). The same condition viewed by Gordon at 0800 existed at 1300 as well (101a). Gordon further testified that his testimony was fully consistent with the log entry made by the other port relief officer, that is, "the gangway was clear of snow, ice and other dangerous conditions" (102a).

It is in the context of the above account from Shipowner that the testimony of Plaintiff must be viewed—particularly with respect to the indemnity action.

Plaintiff was, on January 2, 1971, a dock man in the Fortunado Gang working at the 23rd Street Pier in Brooklyn (41a-42a). Plaintiff testified that between 0800 and 1200 he had no occasion to go aboard the vessel (43a). The gang broke for lunch at 1200 and returned at 1300 (43a-44a). Plaintiff first attempted to board the MORMACDRAGO at 1400 while he was in the process of bringing coffee to various members of the gang (44a). The account given by plaintiff thereafter is simple, direct, and was repeated almost verbatim many times. Scalafani said that the gangway had snow and ice on the various steps (48a). Snow and ice were in patches (48a). Over each step was a covering of sawdust atop the snow and ice (48a).

The Plaintiff's accident occurred on a platform on top of the gangway. This, too, had patches of snow and ice with sawdust on top of it (51a, 61a, 69a, 70a and 127a). Plaintiff observed the snow, ice and sawdust both before and after his accident (62a, 127a and 128a).

Plaintiff states that he slipped and fell while he was on the platform. He reached this conclusion sometime subsequent to his accident.

Two other witnesses were called by Plaintiff. These were Anthony Misseri (44a), a longshoreman in Stevedore's employ and Bianco Bianchi (173a), also a longshoreman. Misseri states he saw the accident (149a), while Bianchi was not an eye witness (174a). Misseri (150a, 163a) and Bianchi (184a) both testified that the platform at the top of the gangway had patches of snow and ice and that it was covered with sawdust. Bianchi, as a matter of fact, characterized the ice as a "little ice" (184a) while Misseri called the ice "patches" (163a).

The last bit of significant data consisted of a stipulation by counsel (108a-109a) concerning the testimony which would have been given by one Patrick O'Connor, a superintendent for Stevedores (109a). It was stipulated that the gangway and platform may have had some patches of snow with sawdust on top of it. O'Connor actually observed the conditions which existed (109a). He stated that no dangerous condition which might require correction existed (109a).

POINT I

The Court should have entered judgment in favor of Stevedores with regard to the indemnity action on the undisputed facts.

Though not explicitly stated, the implied rationale of the lower court's decision is that Stevedore must insure Shipowner against the legal consequences of the injury to Plaintiff aboard Shipowner's vessel.

Preliminarily it should be stated that Stevedore is, in no sense, the insurer of Shipowner as to accidents caused by the unseaworthiness of Shipowner's vessel.

Judge Lumbard of this court wrote in *Calderola* v. *Cunard Steamship Co. Ltd.*, 2 Cir., 1960, 279 F.2d 475, 478.

> "* * * Under this agreement Clark was not required to act as an insurer against any loss by Cunard or to discover and correct every hidden danger. Its duty was only to perform its services with 'reasonable safety'. Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 1958, 355 U.S. 563, 78 S.Ct. 438,

2L.Ed. 2d 491; Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 1956, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133."*

Stevedore submits that the case at bar represents a classic fact pattern requiring the denial of indemnification.

The undisputed testimony reflects that Stevedore had absolutely no responsibility to either remove ice and snow from the gangway or to treat it with sawdust or other corrective material.

The ship's corrective operations occurred on January 1, 1971. At that time no cargo operations were in progress and Stevedore neither participated in nor observed the conduct of the clean up operation.

The *only* knowledge on the part of Stevedore as to the clean up operation was the *appearance* of the gangway and the platform on top of the gangway. We shall speak to the evidence momentarily; suffice it to say here that there is no claim that Stevedore bore any responsibility for any mechanics of the actual clean up.

The courts have long implemented a basic policy in allocating responsibility for injuries to maritime workers. It has been said that the party which is in the superior position to prevent accidents should bear the ultimate responsibility for injuries caused by a preventable danger. *Italia Soc. Per Azioni* v. *Oregon Stevedoring Co.*, 1964, 376 U.S. 315, 11 L. Ed 2d 732, 84 S. Ct. 748.

The United States District Court for the Eastern District of Pennsylvania had occasion to comment upon this policy in *United States Lines Company* v. *Maritime Ship-*

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* To the same effect see *Cia. Martima del Nervion* v. *James J. Flanagan Ship Corp.*, 5 Cir., 1962, 308 F.2d 120.

cleaning and Maintenance Co., 1970 D.C. Ed Pa., 317 F.Supp. 639.

In the *Maritime Shipcleaning* case (supra), a stevedore was impleaded by a shipowner in an attempt to recover indemnity flowing from an accident to a carpenter who slipped on some tallow in a ship's hold. The vessel had been inspected prior to the accident and nothing unusual or obviously dangerous was observed. The court determined that the cause of the accident was the presence of tallow in the area. Subsequent to the accident a skid mark was apparent where the plaintiff's foot slipped.

In rejecting the shipowner's claim that the stevedore should have detected the dangerous condition and cleaned it up, the court said

> "In the instant matter no such policy reason exists for holding the stevedore ultimately responsible for Rodack's injuries because the stevedore in fact did not breach his warranty of workmanlike service. As between the stevedore and the ship, the latter is in the better position to clean its own ship and discover any latent conditions caused by the inadequate cleaning by the shipcleaners. The condition causing Rodack's injuries, tallow broom-swept with dirt and debris, was not discoverable by reasonable visual inspection. (N.T., 113)."

United States Lines Company v. *Maritime Shipcleaning and Maintenance Co., Inc. and Northern Metal Co.,* USDC Pa., 1970, 317 F.Supp. 639, 644.

The *Maritime Shipcleaning* case bears a striking resemblance to the facts in a decision rendered by this court in *Bertino* v. *Polish Ocean Line,* 2 Cir., 1968, 402, F.2d 863.

In *Bertino,* a winch on deck leaked some oil or a ship's crewman spilled oil on the deck. The shipowner there argued that, with notice of the presence of the oil, the stevedore must bear responsibility when one of Stevedores employees subsequently slipped in the oil. The shipowner, there as in the case at bar, had spread sawdust over the area to render the area apparently safe.

It is noteworthy that this Court fully accepted the principle that the risk must be borne by the entity in the best position to eliminate accidents in the first instance.

> "*The ultimate function of the doctrine of unseaworthiness and the corollary right of the shipowner to indemnification from the stevedore firm is to allocate losses caused by shipboard injuries to those who are best situated to minimize, if not eliminate, the particular risk involved.* DeGioia, supra, 304 F.2d at page 426. Here the maintenance and oiling of the winch were exclusively within the province and control of the Line's employee—that is, the electrician. It was also the Line's employee who knew of and who sought to correct, the danger by spreading sawdust over the oil spot. On balance, we conclude that American did not breach its warranty to perform in a workmanlike manner and that the trial court correctly found that no basis existed justifying indemnity over against the stevedore firm." (Emphasis supplied)

Salvatore Bertino v. *Polish Ocean Lines* v. *American Stevedores, Inc.,* 2nd Cir., 1968, 402 F2d 863, 864.

In Point II of this brief, we recite in detail the actual standard applied to the responsibility of the stevedore to conduct an inspection sufficient to satisfy its warranty of workmanlike performance. We may anticipate here by

stating that Stevedore here fully complied with its obligations as enunciated by decision of law.

Accepting as we must, the mandates of the courts to the effect that Stevedore does not insure Shipowner and that Stevedore is not responsible for conditions not created by it nor readily apparent to it, we must consider the actual testimony.

Shipowner's officer Gordon, testified that he had inspected the gangway and platform—*after* it had been treated with sawdust and that it fully *appeared* to be safe to him.

Stevedore's supervisor, Patrick O'Connor, also observed the gangway, platform and the patches of snow and ice with sawdust atop them and concluded that it was safe.

Thus, there should be absolutely no conflict between Stevedore and shipowner that the gangway and platform *appeared* to be safe.

In affirming a judgment in favor of a third-party defendant Stevedore, the Third Circuit emphasized this critical point. In *Shaw* v. *J. Lauritzen,* 3 Cir, 1970, 428 F.2d 247, the court dealt with a defective ladder. Shipowner contended that stevedore had been aware of certain defects in the rungs of a ladder in the shipowner's control. Shipowner cited various authorities to the effect that where stevedore has notice of a dangerous condition it is required to either stop work or take corrective action.

Shipowner's contentions were rejected by the Third Circuit which pointed out that shipowner cannot conveniently ignore testimony in respect to apparent safety.

> "The cases relied upon by appellant are inapplicable to the situation presented by this record, where at least four witnesses testified that the ladder appeared to be safe."

Shaw v. *Lauritzen,* 3 Cir, 1970, 428 F.2d 247, 249.

As the *Bertino* case (supra) and others have clearly indicated, the presence of sawdust atop a slippery condition (assuming *arguendo,* that there *was* a slippery condition) suggested to Stevedore that appropriate corrective action had been taken.

We do not dispute that plaintiff himself, an employee of Stevedore, may be the vehicle by which fault can be imputed to his stevedore—employer. *Mortensen* v. *A/S Glittre,* 2 Cir, 1965, 348 F.2d 383; *Orlando* v. *Prudential SS Co.,* 2 Cir., 1963, 313 F.2d 822. But the converse is true as well; a plaintiff judged to be blameless in the face of claimed danger stands as proof that there was no such apparent danger.

This point is strongly made by this Court in *Vaccaro* v. *Alcoa Steamship Co.,* 2 Cir. 1968, 405 F.2d 1133.

In *Vaccaro,* the cause of plaintiff's injury was determined to be an inadequately secured bench. Shipowner claimed, as here, that the plaintiff himself had knowledge of a dangerous condition and that such knowledge must be imputed to his employer.

The Second Circuit put to rest the notion that a condition of danger was known to plaintiff (and hence to Stevedore) by pointing out that there was an express finding that plaintiff was not guilty of contributory negligence.

> "In the case at bar appellant only established that American knew of the bench's existence. In addition to this the shipowner had to show American's knowledge that the bench, in the place where it was, created an unsafe condition. There was some evidence tending to prove that one of American's employees, Salzano, and perhaps the plaintiff, knew that the bench was insecure. The trial court, however, expressly found that the plaintiff was not contributorily negligent, and therefore it believed that

> plaintiff neither had nor should have had knowledge of the bench's instability."

Vaccaro v. *Alcoa Steamship Co.*, 2nd Cir. 1968, 405 F.2d 1133, 1138.

In summary, therefore, the record is absolutely barren of any testimony which would indicate that the appearance of the gangway and platform was other than reasonably safe. Indeed all the testimony is to the contrary. Every knowledgeable witness who testified stated that the platform appeared to be safe.

Had the court granted consistent effect to its own findings and the testimony upon which those findings were predicated, it would have rendered judgment in favor of Stevedore on the indemnity issue.

POINT II

The Court applied an erroneous standard of law in judging the claimed obligation of Stevedores to identify shipowners.

Stevedore admits that the trial court erred, both affirmatively and *sub silentio* in its view of the standard by which the workmanlike performance of Stevedore is to be judged.

Stevedore further submits that the law is quite clear that Stevedore's obligations, such as they are, are triggered only with respects to dangers apparent upon a cursory visual inspection. *Ignatyuk* v. *Tramp Chartering Corp.*, 2 Cir., 1957, 250 F. 2d 198, 201; see also *D'Amico* v. *Lloyd Brasileiro Patrinonic Nationale* v. *American Stevedores, Inc.*, 2 Cir., 1965, 354 F.2d 33; *Calderola* v. *Cunard SS Co.*, 2 Cir., 1960, 279 F. 2d 475, 478; *Ferrigno*

v. *Ocean Transport Ltd.,* DC SDNY, 1961, 201 F. Supp. 173; *Cia Maritima del Nervion* v. *James J. Flanagan Ship Corp.,* 5 Cir., 1962, 308 F. 2d 120; *Delaneuville, Jr.* v. *Simonsen, Jr.,* 5 Cir., 1971, 437 F.2d 597; *Scott* v. *SS Ciudad de Ibague,* 5 Cir., 1970, 426 F. 2d 1105.

The trial in court made reference (205a) to some vague standard of "actual or constructive notice". In propounding such a test, the court ignored the actuality of the law and substituted a "standard" which has support neither in decisional law nor in common sense.

A stevedore is not to be charged with "constructive notice" in respect to a condition which appears to be safe upon a visual examination. In the case at bar, as we have seen, all witnesses, both from the ship and the stevedore concluded that the gangway and platform appeared to be safe. Judicial support to that testimony has been given by the Court's finding of no contributory negligence on the part of plaintiff.

In *Quadrino* v. *SS Theron,* DC SDNY, 1970, 323 F. Supp. 1037, affirmed 2 Cir., 1970, 436 F.2d 950, the court pointed out that the failure of the Stevedore to react to a condition which is apparently safe, does not create any constructive notice on the part of the stevedore for the condition in question. The trial court's substitution of some concept of constructive notice applicable to an apparently safe condition, constitutes an erroneous apprehension of law.

CONCLUSION

So much of the decision of the Lower Court as finds Stevedore liable to indemnify Shipowner is erroneous and should be vacated and judgment should be entered on behalf of Stevedore dismissing the third-party complaint.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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CHARLES SCALAFANI,

Plaintiff, -Appellee

- against -

MOORE-McCORMACK LINES, INC.,

Defendant and
Third-Party Plaintiff,
Appellant-Appellee

CORRECTIONS

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- against -

Third-Party Defendant.
Appellant.

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SIRS:

PLEASE TAKE NOTICE that the following corrections should be made in the brief submitted by Thirty-Party Defendants-Appellant.

Page	Read	Should Read
p. 11; Point II, 1st Para., 1st line.	"Stevedoring admits that the Trial Court erred."	"Stevedoring submits that the Trial Court erred."
p. 12, last Para., 2nd line.	"Affirmed 2nd Cir., 1970 436 F. 2d 950."	"Affirmed 2nd Cir., 1970 436 F. 2d 959."

Dated: New York, New York
August 14, 1975

McHUGH, HECKMAN, SMITH & LEONARD

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